Supreme Court, U.S.
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No. 991148

In the

SUPREME COURT OF THE UNITED STATES

PETER CANNICE,
Petitioner,

v.

NORWEST BANK, N.A., NORWEST BANK CARD SERVICES N.A.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT IN THE CIRCUITS OVER WHETHER A COURT OF APPEALS MAY ENGAGE IN DE NOVO REVIEW OF A JURY'S FINDINGS OF FACTS UPON LIABILITY FOR DISCRIMINATION

II. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO SET FORTH THE PROPER BURDEN OF PROOF FOR A PLAINTIFF IN A CASE UNDER THE AMERICANS WITH DISABILITIES ACT FOR DISCRIMINATION BECAUSE OF A FAILURE OF REASONABLE ACCOMMODATION.

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OPINIONS BELOW

Following a trial in the United States District Court for the Southern District of Iowa, the jury rendered its verdict in favor of the Petitioner, Peter Cannice ("Cannice"), on his two civil rights claims. Upon post-trial motions, the district court denied Respondent's motion for judgment as a matter of law on Cannice's disability harassment claim but granted the motion as to the failure of reasonable accommodation claim. Both parties appealed. The opinion of the United States Court of Appeals for the Eighth Circuit nullifying both verdicts is set forth in the Appendix, App. 1-10, and is reported at 189 F.3d 723 (8th Cir. 1999). The denial of the rehearing petitions by the Court of Appeals is set forth in the Appendix, App. 11, and it is not reported.

STATEMENT OF THE BASIS FOR JURISDICTION IN THE SUPREME COURT

The statutory basis for this Court's jurisdiction is 28 U.S.C. § 1254. A jury trial was held in the United States District Court for the Southern District of Iowa pursuant to the terms of 42 U.S.C. §§ 12117(a) and 1981(a)(2), (b) & (c), and both parties appealed from the final judgment of the court. After the adverse decision of the Court of Appeals, Cannice filed a timely petition for panel rehearing and rehearing en banc, which was denied on October 4, 1999. This Petition is timely filed within 90 days of the panel rehearing denial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Seventh Amendment of the United States Constitution

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law

The Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a).

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms and conditions, and privileges of employment.

The Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A)

> As used in subsection (a) of this section, the term 'discriminate' includes - . . . (5)(A) not making reasonable accommodations to the known physical

> or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

STATEMENT OF THE CASE

Procedural History

Believing himself the victim of discrimination because of his psychiatric disabilities[1] (chronic depression, panic disorder, epileptic seizures and anxiety), Peter Cannice filed suit in federal district court under the Americans with Disabilities Act.[2] A federal district court jury returned verdicts in favor of Cannice, finding that he was illegally harassed because of his disabilities and that Respondent, Norwest Bank N.A. ("Norwest"), failed to provide a reasonable accommodation for Cannice's known disabilities. The district court, upon a post-trial motion pursuant to Fed. R. Civ. P. 50(a), set aside the reasonable accommodation verdict but upheld the jury determination of disability harassment. Norwest appealed, Cannice cross-appealed and the Court of Appeals nullified both verdicts, holding on the harassment claim that

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[1] The Americans with Disabilities Act defines "disabled" to include individuals who suffer from physical or mental impairments. 42 U.S.C. § 12102(2)(A).

[2] Cannice also filed other claims which are not involved in this petition.

Cannice "presented insufficient evidence that the alleged harassment occurred 'because of' his disability . . . . [and] we do not think that these events could be described as either pervasive or severe. . ." On the accommodation claim, the Court of Appeals held that Cannice "lacked proof that an accommodation of his disability would have allowed him to keep his job." (App. p. 3-4, 7) The Court of Appeals denied Cannice's timely-filed Petition for Rehearing on October 4, 1999.

Summary of the Reasons the Petition Should be Granted

This Court should grant certiorari in this case for two reasons: (1) there is a clear split among the circuits as to the proper deference to be given jury findings of fact in a workplace harassment case, despite the Seventh Amendment's bar against "reexamination", and (2) the clear terms of the Americans with Disabilities Act on the respective burdens of proof and production in a disability discrimination case are being ignored by the Courts of Appeal, in violation of Congressional intent in enacting the statute.

STATEMENT OF THE FACTS[3]

While employed at Norwest, Cannice was psychiatrically disabled. He suffered from chronic depression, panic disorder, epileptic seizures and

[3] Since the jury found in favor of Cannice, the facts summarized herein are set forth in a light most favorable to him and based upon all of the testimony and exhibits in the record.

anxiety. His disabilities had physical manifestations as well: he suffered from an enlarged liver, sleep disturbances, lack of energy, inability to concentrate, and inability to enjoy events and social interactions, although he was still able to do his job quite well. Cannice's disabilities led to a hospitalization in 1989. He was able to return to work, however, and in the fall of 1990, he became a collector in the Collections Department of Norwest. In this position, Cannice impressed his managers and co-workers as a positive person and excelled in his job. For the next two years in that position, Cannice was given excellent performance evaluations.

Unfortunately for Cannice, through 1992 particularly, various offensive incidents occurred in his department, in violation of company policy but condoned by management and extremely disturbing to Cannice. Despite his fragile psyche, well-known to his co-workers and managers, Cannice's work area was bombarded with crass and offensive innuendos and activity: condoms and explicit magazines were openly exchanged, they constantly discussed sexual escapades within easy earshot of Cannice, his religious beliefs were repeatedly questioned, they held "doughnut days" to celebrate sexual conquests and a "penis cake" was brought as a birthday gift between co-workers.

As a result of these events, in August 1992, Cannice visited the human resources manager, provided her with materials about the ADA and mental disabilities. Cannice sought her assistance in dealing with the harassment. He testified that: "[W]hat I wanted to know was how . . . can things be

changed in the workplace to make it easier for people with mental illness, with diseases you can't see." (Tr. 128). Shortly after this, Cannice was denied a promotion and the successful applicant, who was one of his frequent tormenters, gave him a tissue marked "Peter's crying towel," badgering and taunting him.

Cannice was not silent; he sought assistance from his employer. While no company policy required the lodging of a formal, written complaint of harassment, Cannice's managers refused to address his complaints unless and until he put his complaint in writing. Cannice's disabilities made it incredibly distressing to relive and retell the various incidents, and he required a whole month to put the events into a detailed written narrative. Once he met that prerequisite, Norwest delayed the investigation for a full month. In October the investigation was finally commenced, during which time the investigators frequently interrogated Cannice in the conference room used for meting out discipline. Cannice emerged from these interrogations in tears, "completely distraught". (Tr. 613) The company officials also began intense surveillance of Cannice. They closely monitored Cannice and his supervisors kept logs of his lunch and bathroom breaks. He was denied a personal, non-monitored telephone line to make calls to cope with his anxiety and panic attacks. When he asked to be moved away from his main tormenter, he was instead moved to a desk in the midst of three managers, increasing the level of scrutiny and his anxiety and depression.

Through the fall of 1992, Cannice was under mounting pressure. Despite his ability to work, his mental and physical condition began to deteriorate rapidly. The constant barrage ultimately took its toll and Cannice was forced to take disability leave early in January 1993. Even then he was not left alone to recuperate. Instead, his managers frequently called him at home to ask when he would return from his disability leave. But, they never contacted his psychiatrist to determine how best to return Cannice to the workplace. An officer of Norwest also made an ominous, suggestive call and followed it up with a memorandum to the human resources department alleging (without basis) that Cannice had violated the terms of his disability leave, causing a disruption in the benefits he relied upon for survival. No attempt was made by anyone for Norwest to explore the nature or extent of Peter's disabling conditions or any measures which could be taken to accommodate him and return him to work.

Cannice offered through his own testimony and that of his psychiatrist and rehabilitation counsellor, a number of possible accommodations that would have kept him working or returned him to Norwest soon after the respite of his short-term disability leave. These included separation from his harasser and having easier access to a telephone that would allow him to speak with his therapist in private, a flexible work schedule, and a period of stabilization upon his return to work. He also asked that the harassment cease.

The jury heard and saw the witnesses and reviewed the documentary evidence and did not

believe management's denials and excuses. The rapid nature of Peter's decline was obviously apparent to the jury. Cannice went from being a management finalist in September to taking short-term disability in January because of his psychiatric disabilities and harassment. These were the months that directly corresponded with Cannice's reporting of the harassment and his disclosure of the full nature of his disabling conditions. The trial court's instructions to the jury were correct and it was up to the jury to determine whether what transpired in 1992 violated the Americans with Disabilities Act. Clearly, the jury found substantial evidence that Cannice's mental condition was a motivating factor in the the pattern of conduct, a finding of fact that should not have been rejected by the appellate court.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT IN THE CIRCUITS OVER WHETHER A COURT OF APPEALS MAY ENGAGE IN DE NOVO REVIEW OF A JURY'S FINDINGS OF FACTS UPON LIABILITY FOR DISCRIMINATION

There is at present a clear division among the circuits as to whether the existence of a hostile work atmosphere is a fact for a jury's determination or a question of law subject to *de novo* review and appellate redetermination. It is clear that an illegal hostile environment may be proven as either severe or pervasive. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); *Oncale v. Sundowner Systems, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 1003 (1998); *Burlington*

Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 2265 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 2283 (1998).

Three circuits, the Eighth, Second and Fourth, have held that juries should determine whether harassment is sufficiently hostile, severe or pervasive. *See, e.g., Hathaway v. Runyon*, 132 F.3d 1214, 1221 (8th Cir. 1997)(sexual harassment case); *Gallagher v. Delaney*, 139 F.3d 338, 343 (2nd Cir. 1998); *Webb v. Baxter Healthcare Corp.*, 57 F.3d 1067 (4th Cir. 1995)(table). Three circuits have held that the determination of the existence of a hostile environment is the responsibility of the court and is a question of law to be reviewed *de novo*. *See, e.g., Fuller v. City of Oakland, Cal.*, 47 F.3d 1522, 1527(9th Cir. 1995); *Stacy v. Shoney's Inc.*, 142 F.3d 436 (6th Cir. 1998)(table); *Baskerville v. Culligan Intern. Co.*, 50 F.3d 428, 430 (7th Cir. 1995).[4] The Third, Fifth and Tenth circuits have made findings on whether a hostile environment existed, but have not explained why an appellate court rather than a jury would be the proper body to make such a determination. *See e.g., Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1366 (10th Cir. 1997); *Konstantopoulos v. Westavco Corp.*, 112 F.3d 710, 716 (3rd Cir. 1997); *DeAngelis v. El Paso Mun. Police Officers Ass'n.*, 51 F.3d 591, 597 (5th Cir. 1995). This Court should resolve the conflict among the circuits and provide proper guidance on the role of courts and juries in view of

[4] Although the court in *Baskerville* also opined that the jury's verdict in a close case involving unpleasant circumstances or those rising to the level of illegal hostility, "cannot be set aside in the absence of trial error." *Baskerville*, 50 F.3d at 431; *accord, Hathaway*, 132 F.3d at 1221.

the right to jury trial embodied in the Seventh Amendment. This Court should uphold the jury prerogative in fact-finding in harassment cases.

In this case, the jury was correctly told in the court's instructions what Cannice had to prove in order to obtain a jury verdict on each of his two claims. The jury found both the claims had been proven. The jury having fulfilled its role correctly pursuant to the Seventh Amendment, the Court of Appeals was entirely without any right to conduct its own, *de novo* reexamination of the evidence. This Court has said that: "Only where there is a complete absence of probative facts to support the conclusion [the jury] reached does a reversible error appear. . . [T]he appellate court's function is exhausted when [an] evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Lavender v. Kurn*, 327 U.S. 645, 653 (1946). As can be seen from the summary of the evidence above, there was not a "complete absence" of facts in support of the jury's verdict.

The principle of constitutional law that factfindings by a jury cannot be retried is particularly important in discrimination cases, which peculiarly call upon the "layman's common sense" found in a jury's verdict. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343-44 (1979)(Rehnquist, J., dissenting). Indeed, decisions of this Court in harassment cases repeatedly have emphasized the fact-finding which must be conducted to determine whether discrimination has occurred through harassing conduct. In *Meritor Savings Bank v. Vinson*, this

Court first assigned to the trier of fact the determination of whether sexual harassment existed "in light of the 'record as a whole' and 'the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'" 477 U.S. 57, 68-69 (1986). This view of the factfinder as the determinant of the presence of illegal harassment has been consistently followed through to this Court's most recent decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 1002 (1998).

This Court has clearly enunciated the basic factfinding issues in a harassment case: whether workplace harassment is hostile or severe and whether it is because of or based upon an impermissible reason. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Whether harassment is based upon sex, race, religion or disability,[5] its severity and basis are elements uniquely susceptible to determination by the factfinder. And, as fact issues for a jury's consideration pursuant to the Seventh Amendment, an appellate court cannot review the factual record and issue its own factual determinations without violating the Constitution's proscription against factual reexaminations.

Norwest was indisputably aware of Peter's

[5] This Court has recognized that a "hostile work environment" may be found to be illegal for a variety of reasons; Title VII and the Americans with Disabilities Act provide two bases for such claims. 42 U.S.C. §§ 2000e-2(a)(1), 12112(a). *See, Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989). *See also* 29 CFR § 1604.11 n.1.

mental state; the jury was properly instructed. The jury had ample evidence to determine that the harassing acts were "because of" Peter's disability[6] . No requirement exists that harassing actions have bright labels assigned to them; harassers and intimidators frequently act to harm people based upon a host of motivations. The question of whether Norwest's motivation was illegal was for the jury to decide. Direct evidence of discriminatory intent is not required. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)

The Court of Appeal's conclusion as a matter of law that the harassment of Peter was neither pervasive nor severe also violated this Court's requirement that the factfinder perform a contextual review of all of the evidence. *Harris*, 510 U.S. at 23. The Court of Appeals only considered overt harassment connected to Peter's disability and ignored evidence of harassment having sexual overtones,[7] even though prior Eighth Circuit case law recognizes a jury's right to rely on a broad range of evidence as it weighs the totality of the evidence on the issue of illegal harassment. *Carter v. Chrysler Corp.*, 173 F. 3d 693, 700-01 (8th Cir. 1999); *Hall v. Gus Const. Co., Inc.*, 842 F.2d 1010, 1014 (8th Cir.1988).

Indeed, a reasonable jury could find that the cumulative effect of the various forms of

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[6] Congress has specified an unlawful employment practice is established when the characteristic is shown to be "a motivating factor". 42 U.S.C. §§ 2000e-2(m), 12117(a).

[7] Even though the Circuit Court recognized those acts "may have exacerbated his disability." App. at 4.

harassment outlined above created a hostile environment because of Peter's mental condition, and that Norwest condoned and encouraged such harassment. *See Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1109 (8th Cir. 1998). This Court has instructed courts upon the need to examine the "totality" of the evidence and events in context in arriving at verdicts. *Oncale*, 118 S.Ct. at 1003; *Harris*, 510 U.S. at 23. That is precisely what the jury did, and what the Court of Appeals failed to do.

Harassment is designed to disrupt the mental well-being of its victim, whether the harassment is because of gender, race, religion, or disability bias or stereotypes, but a breakdown need not occur before the the point of illegality is reached, if the abusive environment "would reasonably be perceived, and is perceived, as hostile or abusive." *Harris* , 510 U.S. at 23. The Court of Appeals erred in excluding from consideration evidence of harassment with sexual content to which Cannice was subjected. When this evidence is included, it is clear the jury had sufficient support for its determination that the harassment was pervasive and that it was motivated by an awareness of Cannice's mental condition.

The ADA prohibits discrimination in employment against a disabled person with respect to "terms, conditions and privileges of employment." 42 U.S.C. § 12112(a). The standards of this Court's Title VII hostile environment cases apply likewise in ADA harassment cases. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). And while "simple teasing . . . offhand

comments, and isolated incidents" may not amount to illegal harassment, a reasonable jury could easily find that, viewed in their entirety, the actions to which Cannice was subjected were abusive and illegal conduct. *See, Faragher*, 524 U.S. at 2283. Direct evidence through an admission of responsibility is never heard in a jury tria. This is why the law permits jurors to assess all the evidence with their logic, common sense, senses and knowledge, in order to render justice.

For the jury to have rendered its verdict for Cannice, it must have found as a fact that he was subjected to a work environment that a reasonable person in his position would find to be abusive or hostile in light of all the circumstances. *Oncale*, 523 U.S 75, 118 S.Ct. at 1003; *Harris* , 510 U.S. at 23. That is a reasonable inference for the jury to have reached based upon the above facts and proper review standards. In view of the constraints upon courts placed by the Seventh Amendment, this inference was not subject to disregard by an appellate court.

It is also possible that the jury could have found Norwest vicariously liable for the variety of actions taken by Cannice's supervisors and managers which pushed him over the brink. *See Faragher*, 524 U.S. at ___, 118 S.Ct. at 2293; *Ellerth*, 524 U.S. at ___, 118 S.Ct. at 2270. Cannice's mental state was damaged by the treatment of his managers and supervisors: he lost a promotional opportunity, received discipline under suspicious circumstances, and when he could no longer take the pressure from Norwest managers, he was forced out of his job. The evidence of continuing managerial harassment of

Cannice, which the managers denied but which he testified existed and affected him, was solely within the ken of the jurors who were present to watch witnesses struggle as they were confronted with evidence of their actions to contradict their sworn testimony. An appellate court on review cannot substitute its judgment for such credibility determinations.

The jury correctly determined that Cannice's loss of his promotion, his discipline and his being forced from his full-time employment were tangible in nature. Indeed, the jury could reasonably have agreed with the unrebutted testimony of Cannice's rehabilitation expert, and his psychiatrist that immediate relief from the verbalizations would have allowed Peter to remain at work or that he could have worked part-time rather than full time. Cannice was forced out of his employment and the jury was correct in finding that was the result of the harassing environment to which he was subjected.

Because of the conflict in the circuits regarding their power of reexamination following a jury trial, this Court should grant Cannice's Petition in order to set forth the proper review in which appellate courts may engage if they are to be true to the injunction of the Seventh Amendment to the U.S. Constitution. In the alternative, as this Court has recently granted certiorari in *Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536 (November 8, 1999) on somewhat related issues, Cannice requests that this Court grant certiorari, withhold review and remand this case to the Court of Appeals if the decision in *Reeves* is dispositive upon the issues set forth in this

petition for certiorari. Should the consideration of the *Reeves* case not be dispositive, Cannice requests this Court to grant certiorari and consider the issues presented herein.

THIS COURT SHOULD GRANT CERTIORARI TO SET FORTH THE PROPER BURDEN OF PROOF FOR A PLAINTIFF IN A CASE UNDER THE AMERICANS WITH DISABILITIES ACT FOR DISCRIMINATION BECAUSE OF A FAILURE OF REASONABLE ACCOMMODATION.

The other flaw in the Court of Appeals's decision arises from the improper imposition of the burden of proof upon Cannice coupled with the level of proof required, clearly in contravention of the terms of the Americans with Disabilities Act, Fed. R. Civ. P. 50(a) and this Court's holdings.

Congress decreed in the Americans with Disabilities Act that a "qualified individual with a disability" should not be the victim of discrimination and that one form of discrimination is the failure to make "reasonable accommodations" to the known limitations of an "otherwise qualified individual with a disability." 42 U.S.C. §§ 12112(a) & (b)(5)(A). In order to know what accommodations may be needed, the disabled individual has to open a dialog with his or her employer and the employer must then to make good faith efforts to consult and to ascertain the appropriate reasonable accommodation. 42 U.S.C. §§ 12111(9), 12112(b)(5)(A);

see 29 CFR §§ 1630.2(m), .2(o), .9. Most striking is Congress's reaffirmation of the mandate to employers under the ADA through its subsequent passage of the Civil Rights Act of 1991, recognizing that employers which show "good faith efforts, in consultation with the person with the disability . . . to identify and make a reasonable accommodation" will not be held liable for damages. 42 U.S.C. § 1981(a)(3)(emphasis supplied). The reciprocal nature of the responsibilities of the two parties to an employment relationship when an employee is disabled cannot be clearer.

In the Americans with Disabilities Act, Congress specifically stipulated that the burden of proof is on the employer to make a reasonable accommodation for the disabled individual or demonstrate that the provision of accommodations would be an undue hardship. 42 U.S.C. § 12112(b)(5)(A); *see* 29 CFR § 1630.15(d). Plaintiffs cannot be required to prove that a reasonable accommodation "would have allowed him to keep his job", as the Court of Appeals required in *Cannice*, if there is no evidence offered by the employer of any undue hardship or its attempts at good faith interaction. Congress clearly declared in the Americans with Disabilities Act the respective burdens, and Norwest had the burden to prove to the jury's satisfaction that there was a legitimate reason why no reasonable accommodation could have been made. 42 U.S.C. § 12112(b)(5)(A); 29 CFR §

1630.15(d)[8] . Thus, when the jury received the evidence and determined that Norwest did not make a good faith attempt to interact with Cannice and that no undue hardship justified its failure to make reasonable accommodation for Cannice's known disabilities, the Court of Appeals cannot substitute its judgment for that determination. Ample accommodations existed to keep Cannice in his job or to return him, safely, to that job or another. *See* 42 U.S.C. § 12111(9). The jury could rationally determine that Norwest violated the ADA by knowing of Cannice's condition and not working with him to fulfill its obligation to engage in consultation to find a reasonable accommodation. The Court's imposition of a greater proof burden is violative of Congress's intent in passing the Americans with Disabilities Act.

The clear inference the jury drew from all of the evidence was that Norwest could have

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[8] In fact, the imposition upon Cannice of the burden of proving that an accommodation "would have allowed him to keep his job" is a departure from case law defining the factual inquiry for the jury as whether a reasonable accommodation is "possible." *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944 (8th Cir.), *reh. denied (1999)*; *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995). However, both of these cases involved rulings reversing grants of summary judgment. Where a jury finds discrimination because of a failure of reasonable accommodation, its determination (that Cannice's suggested accommodations would have allowed him to work and not been an undue hardship to the employer) is binding upon the reviewing court. *Lavender*, 327 U.S. at 653.

reasonably accommodated Cannice's psychiatric disabilities but refused to do so. Unrebutted evidence established that ample accommodations were available. Cannice was a well-qualified employee who just missed being promoted, and then a consistent pattern of abuse was levelled at him by managerial personnel until he could no longer take the steady pressure and was forced out of his job. Norwest managers never endeavored to talk to him or his doctor, to work with him to keep him in his job or to find a way for him to return. The jury assessed all of this evidence, but the Court of Appeals entirely ignored these facts as it engaged in its own review of the evidence. The court, in a flagrant *de novo* reexamination of the evidence and with a wholesale disregard for the seriousness of Cannice's mental illness, disparaged whether a private line was necessary despite evidence that a private line close to his workstation would make a vital difference and was not an undue hardship for Norwest.

The court imposed an impossible burden upon Cannice, proof to *its* satisfaction that a proposed accommodation would actually work, ignoring the clear intent of Congress and the language of the Seventh Amendment. Further, the Court of Appeal's holding that "[Cannice] did not say that he would have been able to continue functioning in his job if Norwest had provided him with a private telephone line," improperly imposes an appellate court's view of the evidence upon a jury's assessment of it. App. at 9. This also imposes upon plaintiffs a particular testimonial formula when the correct issue is whether the jury made a reasonable inference from the evidence at trial. A

personal testimonial prediction that a proposed accommodation will succeed is not required by the Americans with Disabilities Act, the proper standard of proof or this Court's cases. Such a requirement elevates form over substance; the reasonableness of the jury's inferences is what counts. A plaintiff's burden is met so long as there is credible evidence that an accommodation would ultimately make the employee qualified to perform the essential functions of the position. 42 U.S.C. § 12111(8). In this case, Cannice's evidence on that point was ample and unrefuted, and the jury's factfinding conclusive. Further, the Americans with Disabilities Act only requires reasonable accommodations for "an otherwise qualified individual with a disability" who is then, by virtue of those accommodations, made capable of performing the essential functions of his or her position. 42 U.S.C. §§ 12111(8) & 12112(b)(5)(A)(emphasis supplied). The requirement that the disabled individual first prove what accommodations would make him or her "qualified" to be protected by the Americans with Disabilities Act is illogical and contrary to the intent of Congress. Certainly, persons with disabilities may need to inform their employers of their need for an accommodation, but finding the precise outcome to the problem can hardly occur before the parties interact to find it. Because of the confusion and split among the circuits as to the proper proof methodologies in a failure of reasonable accommodation case, this Court should set forth the proper burdens of production and persuasion which must be met by the parties in a case brought under the Americans with Disabilities Act. *See Borkowski*

v. Valley Central School District, 63 F.3d 131, 136-37 (2nd Cir. 1995).

Contrary to the Court of Appeal's view, Cannice's request for an accommodation was not to have Norwest provide "an aggravation-free environment." App. at 8. Rather, what Cannice requested and what the jury approved was a reasonable accommodation in accord with established law, so that the harassment affecting Cannice would be promptly dealt with and an interactive process engaged in to find other ways of working with his limitations. Congress's passage of the Americans with Disabilities Act imposes a clear affirmative duty upon employers to reasonably accommodate "individuals with disabilities". 42 U.S.C. § 12111(9); 29 CFR § 1630.2(m), .9. And, as this Court has most recently made clear, an individualized assessment of such individuals must be undertaken, and speculation cannot play any part in determining the reasonableness of a proposed accommodation. *Sutton v. United Air Lines, Inc.*, ___ U.S. ___, 119 S.Ct. 2139, 2142 & 2147 (1999).

It is hard to imagine an accommodation which would cost and inconvenience an employer less than any of the proposed accommodations upon which there was testimony that the jury evidently believed. In its *de novo* reexamination of the record, the Court of Appeals belittled Cannice's objection to using a conference room telephone as a private calling place even though the evidence showed that this room was the very same room used for "interrogation," disciplining and terminating employees. The jury reasonably inferred that

Norwest's offer of this allegedly "safe" place as an accommodation was, in actuality, a not-so-subtle continuation of the harassment already destroying him and not an offer not made in good faith, as the statute requires. The reviewing appellate court had no right under standards governing review under Fed. R. Civ. P. 50(a) and the Seventh Amendment to reject such a fact-finding implicit in its verdict.

In holding there was no evidence that reasonable accommodations "would have" kept Cannice in the workplace, the Court overlooked ample evidence to the contrary accepted by the jury, and the long established proscription against an appellate court's rejection of a jury's factfinding on material issues of fact. The jury heard multiple suggested reasonable accommodations, detailed *infra*, evidence which established that Cannice could have continued to work for Norwest with a combination of accommodations. The jury heard the evidence and saw the witnesses; eight reasonable citizens determined that any protestations by Norwest of trying to help Cannice were hollow and false, that Norwest's witnesses were not credible and that Peter had tried throughout the fall to retain his employment but nothing he did was good enough for Norwest. The jury's verdict was reasonable, rational and based upon ample evidence to "support" its determinations that Cannice was the victim of both harassment and disability discrimination through Norwest's failure to reasonably accommodate him.

This Court should grant certiorari because it is necessary to set forth a proper construction of the Americans with Disabilities Act, appropriately

assigning to the employer and disabled employee burdens of proof and statutorily-imposed duties. Only by granting certiorari can the confusion among the circuit courts be resolved and Congress's purposes in passing the Americans with Disabilities Act prevail.

CONCLUSION

For the above reasons, Petitioner Peter Cannice requests that this Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

[Filed August 13, 1999]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Peter Cannice,	*	
	*	
Appellee,	*	Nos. 98-2230/2305
	*	
V.	*	
	*	
Norwest Bank Iowa	*	
N.A. and	*	OPINION
Norwest Bank Iowa	*	
N.A. Card	*	
Services Division,	*	
	*	
Appellants	*	

Appeals from the United States District Court for the
Southern District of Iowa
Charles Wolle, District Judge, Presiding

Argued and Submitted
March 11, 1999 - St. Louis, Missouri

Filed August 13, 1999

Before McMILLIAN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and NANGLE,[1] District

[1] The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation.

Judge.

Opinion by Circuit Judge Morris Sheppard Arnold

A jury awarded damages to Peter Cannice, who suffers from depression, on his claims for harassment and discrimination under the *Americans with Disabilities Act of 1990* (ADA), *see* 42 U.S.C. §§ 12101-12213. Norwest appeals from the trial court's denial of its motion for judgment as a matter of law on the harassment claim, from the inclusion of front pay in the damages awarded to Mr. Cannice, and from the award of attorney's fees and costs to him. (Although there are two defendants, for the sake of simplicity we treat them as one entity in this opinion.) Mr. Cannice cross-appeals from the trial court's grant of judgment as a matter of law to Norwest on the discrimination claim and on the extent of the damages to which he was entitled. We hold that there was insufficient evidence to submit either of Mr. Cannice's claims to the jury and that, as a result, the issues of damages, attorney's fees, and costs are moot; we also remand the case.

I.

The ADA provides that an employer covered by the act "shall not discriminate against a qualified individual with a disability because of the disability of such individual in regard to ... terms, conditions and privileges of employment." *See* 42 U.S.C. §§ 12112(a). The act says nothing explicit, however, about harassment (or, as it is sometimes called, hostile work environment).

We have not yet had occasion to consider whether harassment on account of a disability is actionable under the ADA. *See Moritz v, Frontier Airlines, Inc.*,

147 F.3d 784, 788 (8th Cir. 1998); *see also Wallin v. Minnesota Department of Corrections*, 153 F.3d 681, 687-88 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 1141 (1999). It is not necessary for us to reach that question here, however, because, in any case, Mr. Cannice presented insufficient evidence that the alleged harassment occurred "because of" his disability, as the plain language of the statute would require if such harassment were actionable. *See, e.g., Robinson v. Neodata Services, Inc.*, 94 F.3d 499, 502 (8th Cir. 1996), and *Price v. S-B Power Tool*, 75 F.3d 362, 365 (8th Cir. 1996), *cert. denied*, 519 U.S. 910 (1996).

Mr. Cannice offered evidence of a number of incidents that he maintained constituted harassment on account of his disability. For example, he was not promoted to the position of group leader, although several Norwest employees testified that he was better qualified than the person who was given this position. In addition, his lunch breaks and bathroom breaks were more closely monitored than those of other employees, and his desk was moved closer to that of a supervisor, both of which occurrences were distressing to him,in his depressed state. A witness also testified that Mr. Cannice was asked to remove medication from his desk. Finally, when a friend and colleague left Norwest to take employment elsewhere, one of the group leaders in Mr. Cannice's department tossed a tissue into his office cubicle with a note about a "crying towel"; Mr. Cannice believed that this was a reference to the fact that he sometimes cried at work.

Mr. Cannice complained to the bank's human resources department about the tissue incident, and he maintains that the manner in which the department investigated his complaint itself

constituted harassment. First, the department asked him to put his complaint in writing; this caused him anxiety, he says, and it took him almost a month to comply. There was then an additional month's delay before the department actually began its investigation, in the course of which Mr. Cannice himself was interviewed on several occasions about his complaint and received a formal warning about his own allegedly inappropriate conduct.

Although Mr. Cannice offered evidence indicating that Norwest was aware of his mental state at the time of these incidents (see below), he did not show that this knowledge in any way motivated the offensive conduct. Only the request to put away his medication and the tissue incident could even colorably be connected to Mr. Cannice's mental condition, and we do not think that these events could be described as either pervasive or severe. *See Wallin*, 153 F.3d at 688. The other matters caused him anxiety and may have exacerbated his disability, but there is no evidence that they happened "because of" his disability. Insensitivity alone does not amount to harassment; the ADA, like Title VII, is not in effect a "general civility code," *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002 (1998). We do not believe, therefore, that a reasonable jury could have concluded that Mr. Cannice was harassed because of his disability. Accordingly, we reverse the trial court's denial of Norwest's motion for judgment as a matter of law on Mr. Cannice's harassment claim.

II.

Mr. Cannice also maintains that Norwest failed to make reasonable accommodations to his

depression and that this failure constituted discrimination on account of his disability. This alleged discrimination, together with the alleged harassment, he contends, caused his condition to deteriorate and eventually caused him to take short-term and then long-term disability leave. Under the ADA, one form of discrimination is "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is ... an employee," *see* 42 U.S.C. § 12112(b)(5)(A); this language is tracked in the regulations applicable to the ADA, *see* 29 C.F.R. § 1630.9(a), and is discussed at length in the commentary accompanying the implementation of these regulations, *see* 56 Fed. Reg. 35726 (overview of regulations and appendix), 35726, 35729, 35731 (1991), and in the appendix providing interpretive guidance on, and a section-by-section analysis of, § 1630, see 56 Fed. Reg. 35739 (appendix), 35743-45, 35747-50 (1991).

In order to be entitled to an accommodation, the employee must inform the employer that an accommodation is needed. *See Miller v. National Casualty Co.*, 61 F.3d 627, 630 (8th Cir. 1995). "Once a qualified individual with a disability has requested provision of a reasonable accommodation," the above-noted appendix explains, "the employer must make a reasonable effort to determine the appropriate accommodation." *See* 56 Fed. Reg. 35739, 35748 (1991). This means that the employer should first analyze the relevant job and the specific limitations imposed by the disability and then, in consultation with the individual, identify potential effective accommodation. In other words, the employer and the employee must work together in good faith to help each other determine what

accommodation is necessary. *See Fjellestad v. Pizza Hut of America, Inc.*, No. 98-2071, 1999 WL 391911, at *5-*7 (8th Cir. June 16, 1999). The appendix noted above further suggests that the employer may find it helpful to consult the federal Equal Employment Opportunity Commission or disability constituent organizations when devising accommodations. *See* 5 6 Fed. Reg. 35739, 35748 (1991).

Mr. Cannice offered ample evidence to show that he alerted Norwest to the existence of his disability. For example, Mary Pierson of the human resources department recorded in her notes from one meeting with Mr. Cannice that he told her that he had a stress syndrome. Mr. Cannice also gave information regarding the ADA to Norma Jean Kingsley in the human resources department, and both parties agree that he requested an unmonitored telephone line so that he could talk with his "support network" (Norwest monitored its employees' telephone calls for training and quality assurance purposes). Finally, Mr. Cannice had experienced a panic attack in the office of his supervisor, occasionally cried at work, and was known to be taking medications; these events, Mr. Cannice argues, should have alerted Norwest to his difficulty. A jury could reasonably have found, therefore, that Mr. Cannice informed Norwest of his disability and requested some accommodation.

The trial court, in granting Norwest's motion for judgment as a matter of law on the discrimination claim, ruled that "the evidence does not support [the] contention that [Mr. Cannice's] employer knew of accommodations but refused to place him in a position that would accommodate his disability." Mr. Cannice contends that the trial court wrongly

characterized the defendants' duty, because the court suggested that Norwest was obligated to provide only those accommodations of which it happened to be aware.

Mr. Cannice argues that once he informed his employer of his disability and requested an accommodation, it became Norwest's responsibility to look actively for a solution through the interactive process described in *Fjellestad*, 1999 WL 391911, at *5-*7. The employee is not required to bear the full burden of devising suitable accommodation, Mr. Cannice points out, particularly when he suffers from mental illness; the employer must meet him halfway. *Cf. Taylor v. Phoenixville School District*, 174 F.3d 142, 157-58, 160-61, 163-64 (3d Cir. 1999), and *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1285-86 (7th Cir. 1996). In particular, Mr. Cannice suggests that Norwest should have used the ADA materials that he supplied and that Norwest should have consulted with him about his disability and possible accommodations, such as a more flexible work schedule. *Cf* 29 C.F.R. § 1630.2(o) (2)(ii). Mr. Cannice concludes that Norwest's failure to take such active steps itself constitutes disability discrimination under 42 U.S.C. § 12112(b)(5)(A). We have recently held, however, that "there is no per se liability under the ADA if an employer fails to engage in an interactive process," *Fjellestad*, 1999 WL 391911, at *5, so this claim fails.

Mr. Cannice, moreover, did not make out any other kind of submissible case under the ADA, because he lacked proof that an accommodation of his disability would have allowed him to keep his job. That was an element of his case. We emphasized in *Fiellestad*, 1999 WL 391911, at *7, that the

"employee still carries the burden of showing that a particular accommodation rejected by the employer would have made the employee qualified to perform the essential functions of the job." Mr. Cannice and his experts testified that his condition deteriorated while he was at Norwest and that this was at least in part due to the environment in the department where he worked. It does not appear to us, however, that a reasonable fact finder could conclude that any of the difficulties that he experienced there were due to Norwest's failure reasonably to accommodate his disability or that he left his job because of such a failure to provide an accommodation.

Most of the incidents that Mr. Cannice describes as particularly distressing, and thus as aggravating his condition, were also part of the basis for his harassment claim. He appears to suggest that those incidents constitute discrimination because any type of aggravation constitutes failure to accommodate when the disability in question is depression. We do not believe, however, that the obligation to make reasonable accommodation extends to providing an aggravation-free environment. The facts, for instance, that Mr. Cannice was frequently summoned for questioning about a sexual harassment complaint that he made, and that he was more closely monitored than his colleagues, do not, as a matter of law, amount to a failure by Norwest to accommodate his disability and thus do not give rise to a claim for damages against Norwest.

Mr. Cannice names only one type of accommodation that Norwest could have made, namely, providing him with a private, unmonitored telephone line so that he could talk to his doctor,

friends, or family if he experienced a panic attack. Mr. Cannice requested such a private telephone line, but Norwest offered him instead the use of the telephones in a conference room and in his manager's office. Mr. Cannice testified that neither of these options was satisfactory because the telephones were too far from his desk and he would have difficulty reaching them during an attack. There is no evidence, however, that the lack of a private telephone line impaired his ability to work or aggravated his disability. He did not testify that he in fact ever suffered an attack after he requested a private telephone line or that he ever had trouble reaching a telephone. At worst, he was made anxious by the knowledge that his own telephone was monitored and that the other telephones were some distance away. Most important, he did not say that he would have been able to continue functioning in his job if Norwest had provided him with a private telephone line.

Mr. Cannice has identified no other accommodation that might have prevented his condition from deteriorating and would have enabled him to stay on at Norwest. He therefore failed to make a submissible case on his discrimination claim, and, accordingly, we affirm the trial court's grant of judgment as a matter of law to Norwest on that claim.

III.

For the reasons stated, we reverse the trial court's denial of Norwest's motion for judgment as a matter of law on Mr. Cannice's harassment claim,

and we affirm the trial court's grant of judgment as a metter of law to Norwest on Mr. Cannice's discrimination claim. We remand the case to the trial court for the entry of a judgment consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

[Filed October 4, 1999]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Peter Cannice,	*	
	*	
Appellee,	*	Nos. 98-2230/2305
	*	
V.	*	Order Denying Petition
	*	for Rehearing and for
Norwest Bank Iowa	*	Rehearing En Banc
N.A. and	*	
Norwest Bank Iowa	*	
N.A. Card	*	
Services Division,	*	
	*	
Appellants	*	

Filed October 4, 1999

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 4, 1999

Order entered at the Direction of the Court:

s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit